Arbitration

In The Matter of Arbitration
Between:

City of Duluth, Duluth, Minnesota,
Employer
and
American Federation of State, County, and Municipal Employees, Council 5, Duluth, Minnesota,
Union

BMS Case Number 14 PA 0860
(Scott Hendrickson Collection Systems Maintenance Worker Seniority and Overtime)

Carol Berg O'Toole
Arbitrator

Representatives:

For the Employer:

Steven B. Hanke
Assistant City Attorney
Office of the City Attorney
Room 410 City Hall
411 West First Street
Duluth, Minnesota 55802-1198

For the Union:

Amanda Wilson,
Field Staff
AFSCME, Council 5, AFL-CIO
211 West Second Street
Suite 205
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Witnesses:

For the Employer:
Howard Jacobson, Utility Operator Manager for the City

For the Union:
Deb Strohm, Employment Counselor, Union Steward
Phil Fournier, Collections System Worker, Union Steward
Scott Hendrickson, Grievant, Collection System Maintenance Worker

Preliminary Statement

The hearing in the above matter commenced on October 3, 2014, at 10:58 A.M. and concluded on the same day. The parties involved are City of Duluth (Employer) and American Federation of State, County and Municipal Employees, Council 5, Local 66 (Union). The parties presented opening statements, oral testimony, oral argument, and exhibits. All exhibits offered were received with the arbitrator's admonition that, depending on the exhibit, some would be given less weight. Post hearing briefs were filed by both parties. The arbitrator closed the hearing upon receipt of the last post hearing brief on January 6, 2015.

Issue Presented

The issues were not agreed on so the arbitrator fashioned them as follows:

Issue One: Is the grievance timely?

I**ssue Two**: If so, did the Employer violate the Collective Bargaining Agreement?

Issue Three: If so, what is the remedy?

Statutory Jurisdiction

The Union is "exclusive collective bargaining representative of all Employees working in the classified service excluding police, fire, confidential and supervisory employees as certified by the Bureau of Mediation Services and also defined as public

Employees in Minnesota Statute Section 179A.03, Subd. 14." Joint Exhibit 1. The Employer and the Union are signatories to a collective bargaining agreement (Agreement), Joint Exhibit 1, covering the period from October 3, 2013 to 2015. The Agreement provides in Article 45 that if the grievance is not resolved during the grievance procedure, the grievance may be referred to arbitration. The parties could not agree on a resolution through the grievance procedure; thus, the dispute is properly before the arbitrator. The Employer raised timeliness as a procedural issue at the hearing but neither party raised any other procedural issues.

Employer's Case Regarding Timeliness

The Employer argues that the grievance is untimely and the Union has waived its right to arbitration. The Employer stated that this hearing was the second hearing of three identical grievances involving the same issue with different grievants. The Employer asks that this grievance be decided the same way the other two are decided.

Discusson

The incident giving rise to the instant grievance occurred on September 2, 2013. The grievance alleged that the Employer violated the Agreement by failing to offer Scott Henrickson (Hendrickson) four hours of overtime on Monday, September 2, 2013. The grievance was denied on September 5, 2013, and the appeal of that denial, was made on September 9, 2013. No evidence was presented regarding the alleged untimeliness of the appeal, nor is there evidence indicating it was raised during the process. A panel was requested from the Bureau of Mediation Services on February 14, 2014, and a list was issued on February 25, 2014. Employer Exhibit 3.

The Agreement provides that, "Within ten (10) days of receipt of the Grievance, the manager shall meet with the grieving Employee's and the steward to try to fairly and equitably resolve the grievance." Joint Exhibit 1, Article 45.1(a). Then, within ten days, the Employer has to provide a written response. Joint Exhibit 45.1(b). Further, there is a requirement that the Employer and Union have a twelve day limit at the next level for the presentation and response. Joint Exhibit 1, Article 45.1(c) and (d). That same timeline is kept for the next level. Joint Exhibit 45.2. There is no evidence of a timeliness issue being raised in the written exhibits of either the Employer or Union. There was no testimony by any witness on the day of the hearing that the grievance was untimely. I conclude that the parties both knew they disagreed, that they were unable to resolve the dispute and it was going to arbitration. I see no timeliness issue which prevents deciding this issue on its merits.

Award

I find that the grievance is timely.

Union's Opening Argument

The Union opened by stating that the grievance involved Article 20 of the Agreement. She stated that there was confusion in reconciling Article 20.2 and the recent removal of 20.10. She stated that it had nothing to do with Article 20.2 and that Article 18 was totally separate. The Union asks that the grievance be sustained and the Grievant made whole.

Union's Case in Chief

Witness: Deb Strohm

Strohm works for the City as an employment counselor. She is the treasurer of the local, and the Union steward. She testified that Article 20.10 had no relation to 20.2 and that the Union proposed the change in June, 2013, in an effort to clean up the language.

On cross examination, she stated that maybe the Union didn't propose the change, but both parties agreed to it. She identified Article 51 as the reopener provision.

Witness: Phil Fournier

Fournier testified that he worked for the City as a collection system maintenance worker. He stated he was the Union steward of Local 66. In 1999, there was a merger. The Employer integrated three job titles and created a utility operator as a new position. The Union and the Employers couldn't agree on wages so they compromised. The compromise allowed workers in the old job positions to keep their old positions until they retired. Fournier identified the Employer's policy dated 2/15/2011, Union Exhibit 4, and said discussions on policies took place annually, sometimes more. He said they needed to get agreement on seniority. He testified that when the new position was created, Howard Jacobson was the manager. In July, 2013, both parties stopped meeting and the Employer introduced the new policy.

On cross examination, Fournier was asked if the arbitration hearing held last Thursday was any different than the current one. He said it was the same grievance. Fournier was asked if the City can use standby crews, instead of calling for employees to work overtime. He said "Yes". He also said that there was a difference between standby for sewer and standby for other utilities. He testified that in Article 18.5 standby

for lead workers are first. “They made the decision.” Fournier stated that collection maintenance workers are not eligible for standby because they haven’t been through the training.

Witness: Scott Hendrickson

Hendrickson testified that he has been a systems maintenance worker for 28 years with the City. He stated that he filed the grievance because the, “Employer had promised that our work would stay the same.” He testified that the Employer asked “us if we wanted to be utility operators”. Hendrickson testified that before the merger of the departments, the standby crew worked on water and gas. After the merger, he lost the overtime income and had a loss of job duties.

On cross examination, Henrickson said he had not lost regular work and there was one worker who was more senior than he was. Henrickson testified that he was relying on Article 20.11. Union Exhibit 1 and Employer Exhibit 4. Henrickson testified that there are four workers left under the old system.

On redirect, Henrickson was asked about the “promise”. He stated that, “Steve Lapinsky and Dick Larson communicated with them regarding the promise” in a conversation two years ago out on the job site. Henrickson was asked if utility persons do the same job as he did. Henrickson replied that, “some utility workers do, others don’t.” He stated that they get “bounced around a lot, so they don’t get the experience”.

Employer’s Case in Chief

Employer’s Opening Argument

Counsel for the Employer stated that there is no disagreement with how the collection system maintenance workers are doing the job. When there is a sanitary

sewer call, the Employer can choose to use the standby crew rather than using the call out list. The Employer has that right because of the management rights clause in the Agreement, Article 5. Joint Exhibit 1. The Employer argued that the system maintenance workers have no right to all the call outs. They do not have seniority over everyone. Counsel described the "second elephant in the room": this arbitration is one of three that have been filed and are in arbitration. The Employer asked this arbitrator to follow the others. Counsel stated that there was no prohibition on re-litigation of the issue three times.

Witness: Howard Jacobson

Jacobson testified that he is the utility operations manager for the Employer, the City of Duluth, and has worked for the City since 2001. He stated that his job includes overseeing the maintenance for all City natural gas, water, sanitary sewer, and storm sewer systems. Jacobson reports to Jim Bennig and the five supervisors report to him. Lead workers oversee seven construction crews, with four to five crew members in each construction crew.

Jacobson described the overtime process in accordance with Article 18 of the Agreement. Joint Exhibit 1. He described the standby status as an eight hour shift available after regular hours are worked. Jacobson testified about the emergency provision in Article 17 of the Agreement. Joint Exhibit 1. Jacobson said that a systems maintenance operator is trained to work on two of the four systems in the City where utility operators are trained to work on all four systems. In addition, a worker has to have three years of apprenticeship in order to be eligible to work on all the systems. Jacobson described how Article 19 worked in the case of a call back for emergency

work. He explained the rationale for a memorandum dated August 12, 2013. He said that it allowed for more timely responses and paying only for the time worked as opposed to a four hour call back pay. Jacobson testified that the lead worker can call back whoever is needed. He said that if collection system maintenance workers are put ahead of everyone else, there would be a slower response with a wait sometimes of two hours. He said that presents a safety issue if there is an emergency.

On cross examination, Jacobson testified that he was working at the City at the time of the merger. He was asked what justified "scrapping" the old system, under the 2001 policy. He described the rationale for the new policy. Jacobson testified that it allows for more timely responses and is cheaper. He reiterated that the lead person determines whether a circumstance is an emergency. He stated that the City now has more qualified and experienced employees in the new job position to respond than before.

Jacobson testified that an emergency is defined as a threat to human life or property. He gave a number of examples of emergencies. Jacobson said that the removal of Article 20.10 changed rights and gave management the right to choose which job classification to call. Jacobson then described how the work force had changed with still not enough qualified and experienced standby people to do the work in 2011. In March, 2013, there were nineteen utility operators, qualified and experienced, on standby. Jacobson was asked about the Union's role in policies. He said that the City does not negotiate policies. He said they were not required to negotiate policies as long as they stay within the confines.

On redirect, Jacobson indicated that Article 3 of the Agreement allowed the Employer to control operations. Joint Exhibit 1. He stated that the merger happened fourteen years ago.

On re-cross, Jacobson described the decision to merge as a financial decision involving thousands of dollars. Jacobson testified that he is a steward of the public dollar and it would be irresponsible to do anything other than the most efficient. He was asked why he continued the old system for several years after Lapinski left. Jacobson said that there had been insufficient numbers of utility maintenance workers to implement the policy earlier. He then described the standby worker as not being assigned by seniority and once you sign up, you are on the list. It is "beyond the normal hours" and it is part of the job. Jacobson stated that the work done by the standby workers would not have gone to the grievants.

Discussion

Past Practice

The Union argues that the deleted articles in the Agreement have nothing to do with the current dispute and that past practice for overtime should prevail. I find that the new language is clear and the deletion of the two provisions in the contract have everything to do with the dispute. This language is the enabling language for the Employer's subsequent merger and utilization of workers trained in all four areas of the department rather than the old system.

Past practice applies when the language is unclear or missing. When the parties have negotiated new language allowing the Employer to merge classifications, the practice before the merger is not binding. The Employer is free to establish policy to

supplement the new language whether the Union agrees with it or not. "The law and the policy of collective bargaining may well require that the employer inform the Union and that he be ready to discuss the matter with it on request. But there is no requirement of mutual agreement as a condition precedent to a change of practice of this character." Ford Motor Co., 19 LA 237, 241-2 (Shulman, 1952) as cited by Elkouri & Elkouri, *How Arbitration Works,* 6th Ed., BNA at 12-10. There was testimony about discussions between the parties about the new policy which clearly meets the requirement that the Employer inform and discuss.

There are certain areas where when the Employer exercises its basic management functions, past practice is not binding. These include methods of operation and control of the workforce. Elkouri & Elkouri, *How Arbitration Works,* 6th Ed., BNA at 12-12. "When the language used is clear and explicit, the arbitrator is constrained to give effect to the thought expressed by the words used. Phelps Dodge Cooper Prod. Corp,, 16 LA 229, 233 (Justin 1951) as cited by Elkouri & Elkouri, *How Arbitration Works,* 6th Ed., BNA at 12-24. Past practice, in the wake of the Agreement's new language, new policy, and the nature of the action exercised is not binding.

The Promise

There was testimony that on one occasion, at a job site, the Grievant was told that the promise was in effect. However, there was no testimony, nor written evidence, which would support any claim that the promise to the four employees included anything beyond the retention of the basic job description for the four people. The promise was coupled with the Grievant's opportunity to train for the new job which he decided to forgo. There was no testimony, nor does the Agreement's language, indicate that the

opportunity for overtime in the old positions was guaranteed or part of the promise. In fact, the rationale for the new position and merger flies in the face of an enhanced promise including the old overtime.

The testimony was clear. Hendrickson stated under oath that he had no dimunition of his regular job. That is pretty straightforward. The Employer's rationale, stated to the Union in negotiations and reiterated at the hearing was consistent with the guarantee. The City proposed the new position and new approach to overtime for efficiency and to save money. The new positon can all respond to emergencies of any sort. They are paid for the work they do not for a minimum of four hours.

The Precedential Value of Prior Arbitrations

The Employer argues that this arbitration should follow Arbitrator Boyer's because the grievance giving rise to each are identical. However, certain differences exist within the two grievances and the hearings that resulted. For instance, Boyer saw in the "record" a "verbal notice of intent to submit the matter to arbitration". AFSCME v City of Duluth, (Boyer 2014) at 3. No such evidence of a verbal notice was presented at the October 3, 2014, hearing.

Different witnesses appeared at each hearing. In the Employer's Post Hearing Brief, Nick Economus is quoted at page 17. I heard no such witness. The grievant, himself, was a different person with different seniority.

However, the contract provisions at issue were the same. The Employer argues that the Union should be collaterally estopped from re-litigating the same issue. The Employer cites state cases supporting this notion.

Court cases are different than arbitration in that they hold precedential value. "Prior labor arbitration awards that interpreted the existing terms of a contract between the same parties are not binding in exactly the same sense that authoritative legal decisions are, yet they may have a force that can be fairly characterized as authoritative. Elkouri & Elkouri, *How*

Arbitration Works, 6th Ed., BNA at 11-7. The *Code of Professional Responsibility* recognizes that arbitrators may exercise independent discretion concerning the precedential effect given to prior published opinions unless the parties have indicated mutual agreement to the contrary." Code of Professional Responsibility for Arbitration of Labor-Management Disputes, Section 2(G) (as amended in 2001), as cited by Elkouri & Elkouri, *How Arbitration Works,* 6th Ed., BNA at 11-6. The parties have exhibited no such agreement to the contrary in this case. That absence plus the new negotiated language, the deletion of old contract language and the presence of a new policy results in a merger of the departments and a new way of dealing with overtime in emergencies as well as in other circumstances deemed necessary by the lead worker.

"Unless the collective bargaining agreement provides that prior arbitration awards are to have precedential effect, an award in one case is not binding…" Elkouri & Elkouri, *How Arbitration Works,* 6th Ed., BNA at 11-21. "In any event, it would seem that whenever either party cites an award, the arbitrator should not ignore it." Elkouri & Elkouri, *How Arbitration Works,* 6th Ed., BNA at 11-22.

I agree. I have considered the Boyer award. Our ultimate decision is the same. I find no violation of the current Agreement in this grievance. There is new contract language, a deletion of old contract language and a brand new policy plus a new job position that requires credentialing with an additional apprenticeship and training. Action of the Employer allowing former employees to continue at their old job positions or train for a new job is evidence of good faith. It is not a blank check to have everything as it was ten years ago.

Management Rights

The Agreement provides in Article 5, Management Rights, that the Employer "has and retains all rights and authority necessary for it to….direct the work force…to assign overtime…to change or eliminate existing methods of operations…" Joint Exhibit 1. The Public Employment Labor Relations Act reiterates the Employer's right to establish policy and to direct employees.

Minnesota Statutes 179. Additionally, in emergency situations, the Employer has more flexibility.

The Language of the Agreement

When Article 20.10 was eliminated in the negotiations for the Agreement, it allowed the Employer to decide which job classification does the call back work depending on the nature and status of the work. Once the Employer decides the classification, the selection has to be the most senior employee within that department or classification.

There was no claim by the Union that seniority was ignored by the Employer. It is unfortunate that the Union and the Grievant thought keeping an old job position until retirement included keeping everything the same: policies, response to emergencies, amount of overtime. I find no contract violation. With the change in contract language, including deletion of provisions and creation of a new position, the purview of the Employer changed as did the way the Employer exercised its right to schedule overtime, as long as the seniority within the department was respected.

Award

The grievance is denied.

Dated this 13th day of January, 2015.

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Carol Berg O'Toole